HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1541 (SS) / 2001
(Old No.7857 of 2000)

Rajesh Kumar Gautam

Vs

The State of Uttar Pradesh.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 2760 of 2001 (S/S)

(Old No.7857 of 2000)

Rajesh Kumar Gautam,
S/o Shri Ganga prasad Gautam,
R/o Village Nawalpur,
P.O. Maharora
District Mathura. …… Petitioner

Versus

The State of Uttar Pradesh,
Through Secretary,
Home Affairs, Govt. of U.P.,
Lucknow & others. …… Respondents

Mr. K.S. Verma, learned counsel for the petitioner.
Learned Standing Counsel for the State.

Dated: 12-03-2004

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for the issue of a writ of certiorari to quash the order dated 19.06.1998 and the appellate order dated 9.1.2000.

Brief facts giving rise to the present writ petition are that the petitioner was enrolled as the member of PAC on 13.9.94 as a Constable from amongst the general candidate and was posted in the company of 46th Bn. PAC Task Force, Rudrapur, Udham Singh Nagar. It was alleged against the petitioner that while posted in the company post Karamhri police station Jananiya District Gajipur on 12.5.98 in the midnight while he was on Santari duty and when the duty was checked by incharge, he was found sitting and on being asked for proper duty, he suddenly provoked and abused the incharge and also pointed the rifle towards the incharge. It is submitted by the petitioner that Rule 4 of Rule 1991 has termed dismissal from service and reduction in rank as major punishment and Rule 8(2) of the Rules 1991 lays down that no Police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these Rules. No inquiry whatsoever has been conducted by the authorities and the services of the petitioner has been terminated taking shelter of UP Temporary

Government Servants (termination of services) Rules, 1975. The termination order dated 19.06.98 is quoted below:

UP Temporary Government Servants (termination of services) Rules, 1975 reads as under:

^^fu;qfDr vuqHkkx&03 dh vf/klwpuk la[;k 20@1@74& fu;qfDr&3 fnukad 11 twu] 1975 }kjk foKfIr mRrj izns”k vLFkk;h ljdkjh lsod ¼lsok lekfIr½ fu;ekoyh 1975 ds vUrxZr v/kksgLrk{kjdrkZ dk fu0 55013 jkts”k dqekj xkSre vLFkk;h dk fu0 dks uksfVl nsrs gSa fd mudh lsok;sa dh vc vkxs vkSj vko”;drk ugh jg x;h gS vkSj mudh lsaok;s bl uksfVl dh izkfIr ds fnukad ls lekIr le>h tk;saxh vkSj ;g funsZ”k nsrs gSa fd uksfVl dh ,d ekl dh izkfo/kkfur vof/k ds fy, mldh nj ij viuk osru rFkk HkRrs] ;fn dksbZ gk] /kujkf”k ds cjkcj /ku ds nkosnkj gksus ds gdnkj gksaxs] ftl nj ij og viuh lsok lekfIr ls Bhd iwoZ ij jgs FksA^^

UP Temporary Government Servants (termination of services) Rules, 1975 reads as under:

> ***“1. Short title, Commencement and application*** *– (1) There rules may be called the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975.*
>
> *(2) This Rule and Rules 2, 3 & 4 shall be deemed to have come into force on 30th January, 1953, and Rule 5 shall come into force at once.*
>
> *(3) They shall apply to al persons holding a civil post in connection with the affairs of Uttar Pradesh and who are under the rule making control of Governor, but who do not hold a lien on permanent post under the Government of Uttar Pradesh.*
>
> ***2. Definition*** *– In these rules temporary service means officiating or substantive service on a temporary post, or officiating service on a permanent post under the Uttar Pradesh Government.*
>
> ***3. Termination of Service*** *– (1) Notwithstanding anything to the contrary in any existing rules or orders on the subject, the service of a Government servant in temporary service shall be liable to termination at any time by notice in writing given*

either by the Government servants to the appointing authority or by the appointing authority to the Government servant.

(2) The period of notice shall be one month.

Provided that the services of any such Government servant may be terminated forthwith, and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, in any, for period of the notice or as the case may be period by for the while such notice falls short of one month as the same rates at which he was drawing them immediately before the termination of his services;

Provided further that it shall be open to the appointing authority to relieve a Government servant without any notice or accept notice for the shorter period without requiring the Government servant to pay any penalty in lieu of notice.

Provided also that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing authority, provided in the case of a contemplated disciplinary proceeding the Government servant is informed of the non-acceptance of his notice before the expiry of that notice."

Learned counsel for the petitioner has that Rule 1(3) of the Rules 1975 specifically lays down that the rule shall apply to all persons holding a Civil post in connection with the affairs of UP and the petitioner was not holding a Civil post and his service are governed by the police Act, PAC Act and the Rules framed thereunder. The petitioner has further submitted that Rule 2 of the Rules 1975 defines temporary service which means officiating or substantive service on a temporary post or officiating service on a permanent post under UP Government and the petitioner was neither officiating on a temporary post nor he was officiating on a permanent post rather he had been selected to the PAC Force after adopting due process for selection and has been enrolled on permanent post of a Constable not liable to be terminated under Rule 1975.

The petitioner has moved a writ petition No. 20771/98, wherein Hon'ble Mr. Justice V.M. Sahai was pleased to dispose of the writ petition vide judgment and order dated 25.10.99 directing the petitioner to prefer an appeal and the appellate authority to dispose of the appeal within 2 months. The judgment dated 25.10.99 is quoted below:

> *"Heard Mr. M.D. Misra learned counsel for the petitioner and the learned standing counsel appearing for the respondent.*
>
> *Against the impugned order of termination dated 19.6.98 the petitioner has got alternative remedy of filing a statutory appeal. In case the petitioner filed an appeal before the appellate authority within a period of six weeks the same shall be treated to be within time by the appellate authority and he shall decide the same within a further period of two months.*
>
> *Subject to the observations made above, the writ petition is dismissed on the ground of alternative remedy."*

Then the petitioner preferred an appeal, but he Deputy Inspector General of Police, PAC, Moradabad dismissed the appeal vide order dated 9.1.2000. Then the petitioner approached this Hon'ble Court by way of this writ petition.

Petitioner has stated that he has crossed the period of probation set out in the provisions of paragraph 541(1) of the U.P. Police Regulations, which required service of written show-cause notice against intention of discharging the petitioner and obtaining of the explanation of the incumbent and due consideration of the same, as per wordings of the said provision of law reproduced hereunder; but it is submitted that no such notice has been given to the petitioner calling upon him to submit his explanation against his proposed discharge and as such the provisions of paragraph 541(1) of the U.P. Police Regulations are not applicable in this case. Paragraph 541(1) of the U.P. Police Regulations is quoted below:

"Regulation – 541(1) A recruit will be on probation from the date he begins to officiate in a clear vacancy. The period of probation will be two years except in the following cases:

x x x

x x x

In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with the service. Before, however, this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge.

Every order passed by a Superintendent under Sub-paragraph (2) above shall, subject to the control of the Deputy Inspector General be final."

Rule 55(B) of the Civil Services (Classification, Control & Appeal) Rules reads as under:

'*Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment.'*

Learned counsel for the petitioner has submitted that the provisions of Rule 3 of U.P. Temporary Government Servants (Termination of Services) Rules, 1975 does not provide for exercise of powers of termination by the appointing authorities without the application of their own mind and on basis of directions of their superiors. As such the impugned order of termination is ab-initio void and without jurisdiction.

Petitioner has submitted that Rule 3 of U.P. Temporary Government Servants (Termination of Services) Rules, 1975 has no application in the present case as he is governed by Section 5 of the U.P. PAC Act. Section 5 of the U.P. PAC Act is quoted below:

> *"Section 5. Member of PAC to be deemed Police Officers – subject always to the provisions Section 6 to 8 every member of the Pradeshik Armed Constabulary shall upon his appointment and as long as he continue to be a member thereof, be deemed to be a Police Officer and, subject to any terms, conditions and restrictions, as may be prescribed, to have and be subject to, in so far as they are not inconsistent with this Act or any rules made thereunder, all the powers, privileges, liabilities, penalties, punishments and protection as a Police Officer duly enrolled has or is subject to by virtue of the Police Act 1861, or any other law for the time being n force, or any rules or regulations made thereunder."*

The petitioner has also referred the judgment in writ petition No. 7838 of 1987, Virendra Misra & two others Vs State of U.P. & others, dated 25.2.1991, wherein Hon'ble Mr. Justice S.N. Sahay was pleased to pass the order to the following effect:

> *"The aforesaid provisions intimates that no person who is enrolled or in appointment to be an officer of the PAC can be discharged except in accordance with the provisions of the aforesaid Act. There is no denial of the fact that the allegement regarding that of unfair means in the examination were the foundation for passing the impugned orders of termination of a order against the petitioners. It is important that there is no reference in the impugned orders. In the circumstances it was necessary to follow order. In this order provisions prescribed by para 541(2) of the UP Police Regulations and to supply the petitioner with specific complaints and grounds on which it was proposed to discharge them and to call upon to show cause as*

to why he should not be discharged. In Police Regulations

Para 541(2) enshrined the principles of anti alteram in sortem and even the provisions of para 541(2) not in terms apply to the petitioner, no order of discharge or termination of the petitioner. No order of discharge or termination of the service could have been passed without affording an opportunity to the petitioner to make representation and without considering the same. It has not been shown that any such opportunity was afforded to the petitioners, the impugned orders are therefore illegal and cannot be sustained on the basis of the fact that they passed under purpose to be orders termination of services simpliciter passed under the UP Temporary Government Servants (Termination of Service) Rules, 1975.

The writ petition is allowed and the impugned orders dated October 31, 1987 contained in Annexure No. 1 to 3 to the writ petition passed by opposite party No. 3 are hereby quashed. Parties shall bear their own costs."

Counsel for the petitioner has stated that since the impugned order refers to the Temporary Government Servant Rules, therefore the termination order is wholly illegal and the case is fully covered by the aforesaid judgment.

Counsel for the petitioner has referred the judgment of Chandra Prakash Shahi Vs State of U.P. & others reported in (2000)5 Supreme Court Cases 152, in which it has been held as under:

"3. But, as we shall presently see, the law, on account of recent judgments concerning the services of a probationer, is fairly well settled and there is not cause for being confounded or bewildered. The perplexity which, at one time, surrounded the torrid question involved in this case has yielded to the clarity of reasons propounded by this Court from time to time in recent times to which a reference shall be made during the course of this discussion.

4. The appellant was recruited on 1.10.1985 as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, UP under

the UP Pradeshik Armed Constabulary Act, 1948. He Completed his training on 6.9.1986 and was, thereafter, placed on probation for a period of two years. He completed his period of probation on 5.9.1988 but a year later, on 19.7.1989, his services were terminated by a simple notice in terms of Rule 3 of the UP Temporary Government Servants (Termination of Service) Rules, 1975. The order of termination was challenged by the appellant before the UP Public Service Tribunal which, by its judgment dated 18.1.1993, allowed the claim petition and set aside the order dated 19.07.1989 by which the services of the appellant were terminated. Respondent No. 1 and 2, thereafter, approached the High Court through a writ petition which was allowed on 27.11.1997 and the judgment passed by the Tribunal was set aside.

6. Learned counsel for the respondents has, on the contrary, contended that the appellant was a temporary employee and, therefore, his services could be terminated at any time by giving him a month's notice in terms of the UP Temporary Government Servants (Termination of Service) Rules, 1975. In the counter affidavit filed before the Tribunal before which the order dated 19-07-1989 (termination order) was challenged by the appellant, it was, inter alia, stated that on 24.6.1989 while camping a Ghat Varanasi for Flood Relief Training, a quarrel had taken place between two Constables as a result of which Constable Arun Prakas Tewari used filthy and unparliamentary language against Constable Radhey Shyam Pandey. He also caused injuries to Constable Radhey Shyam Pandey by kicks and fists. He was joined by Constable Rajesh Kumar Pandey. Other Constables also jointed the fray. A preliminary inquiry was conducted by Shri Kailash Chaube, Assistant Commandant, PAC and a few Constables including the appellant were found guilty of indiscipline and misbehavior and it was for this reasons that the services of the appellant were terminated. The respondents admitted in the

counter affidavit that there was no adverse material against the appellant before the incident in question. The original records which were produced before the Tribunal and were scrutinised by it indicated that the order by which the services of the appellant were terminated was passed on account of his alleged involvement in the quarrel between the Constables at the Ghat Varanasi Camp. The Tribunal has found as under:

'The preliminary inquiry File No. Ja-2/89 relating to the petitioner and other Constables of the 34th Battalion, PAC, Varanasi from pp. 21/33 dated 26.6.1989 shows that the inquiry was conducted by Shri Kailash Chaube, Assistant Commandant, 34th Battalion, PAC, Varanasi and in the preliminary inquiry report he concluded at pp. 21/34 to 22/37 that the petitioner along with others had indulged in a misconduct of hurling blows and used filthy language to the superior officers of the Department and he was found guilty along with others of the said misconduct and misbehaviour. Thereafter on internal p. 6 impugned order of termination dated 19.7.1989 was passed respect of the petitioner and on the same day he was served the copy of the order.'

7. It was in view of the above finding that the termination order was held to be punitive in nature was consequently set aside by the Tribunal but the High Court relying upon the decision of this Court in State of U.P. Vs Kaushal Kishore Shukla quashed the order of the Tribunal.

8. The first contention of the learned counsel for the appellant is about the status of the appellant. Learned counsel has contend that the appellant could not have been legally removed from service, except by way of disciplinary action in accordance with the requirements of Article 311(2) of the Constitution. It is contended that after completion of the period of probation, the appellant had acquired "permanent" status and, therefore, his services could not have been terminated by a

mere notice or a month's pay in lieu thereof. This argument cannot be accepted.

9. An assertion that on completion of the period of probation the appellant had acquired "permanent" status is based on a misreading of the provisions of para 541 of the UP Police Regulations, relevant portion of which is quoted below:

'541 (1) Recruits will be on probation for a period of two years, except that –

(a) Those recruited directly in the Criminal Investigation Department or District Intelligence Staff will be on probation for three years, and

(b) those transferred to the Mounted Police will be governed by the directions contained in para 84 of the Police Regulations.

If during the period of probation their conduct and work have been satisfactory and they are approved by the Deputy Inspector General of Police at the end of the period of probation for service in the force the Superintendent of Police will confirm them in their appointment.'

10. A perusal of the above provision would indicate that the period of probation is two years. The Regulation is silent as to the maximum period beyond which the period of probation cannot be extended. In the absence of this prohibition, even if the appellant completed two years of probationary period successfully and without any blemish, his period of probation shall be treated to have been extended as a "permanent" status can be acquired only be means of a specific order of confirmation.

11. This Court in State of Punjab Vs Dharam Singh reported in AIR 1968 SC 1210 ruled out the proposition of automatic confirmation on completion of the period of probation. This Court ruled that the "permanent" status can be acquired only by a specific order confirming the employee on the post held by him on probation. To the same effect is the decision in Pratap

Singh Vs Union Territory of Chandigarh reported in (1979)4 SCC 263. In Municipal Corpn. Raipur Vs Ashok Kumar Misra

Reported in (1991) 3 SCC 325 the same principles were reiterated. In view of the above, the contention that the appellant had acquired "permanent" status cannot be accepted. His status was that of a probationer.

12. Now, it is well settled that the temporary government servants or probationers are as much entitled to the protection of Article 311(2) of the Constitution as the permanent employees despite the fact that temporary government servants have no right to hold the post and their services are liable to be terminated at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service. The courts can, therefore, lift the veil of an innocuously-worded order to look at the real face of the order and to find out whether it is as innocent as worded. (See: Parshotam Lal Dhingra Vs Union of India reported in AIR 1958 SC 36). It was explained in this decisions that inefficiency, negligence or misconduct may have been the factory for inducing the Government to terminate the services of a temporary employee under the terms of the contract or under the statutory Service Rules regulating the terms and conditions of service which, to put it differently, may have been the motive for terminating the services but he motive by itself does not make the order punitive unless the order was "founded" on those factors or other disqualifications.

13. Following the decision of Parshotam Lal Dhingra's case this Court in State of Bihar Vs Gopi Kishore Prasad reported in AIR 1969 SC 689 held that if the services of a probationer are terminated on the basis of an inquiry into the allegations of misconduct and inefficiency, the order would be punitive. It was pointed out that in the case of probationer, it is always open to the Government to hold an inquiry merely to assess the

merits of the employee to find out whether he was fit to be retained in service and confirmed. In another case relating to a probationer, namely, in State of Orissa Vs Ram Narayan Das reported in AIR 1961 SC 177 where the services were governed by Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules which provided that where the services of a probationer were intended to be terminated either during the period of probation or at the end of that period for any fault or on account of his unsuitability, he would be apprised of the grounds of unsuitability and would also be afforded an opportunity to show cause against it before orders are passed against him, it was held that the termination order would not become punitive merely because of an antecedent inquiry but the real object or purpose of the inquiry had to be found out whether it was held merely to assess the general unsuitability of the employee or it was held into charges of misconduct or inefficiency etc. In Ranendra Chandra Baneerjee Vs Union of India reported in AIR 1963 SC 1552 which against was a case relating to a probationer, it was held that on account of Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules if the inquiry was held for a limited purpose of finding out whether the employee was fit to be retained or not, the said inquiry would not make the order punitive as the inquiry could not be related to any misconduct of the employee. This view was reiterated in Jagdish Mitter Vs Union of India reported in AIR 1964 SC 449. In Madan Gopal Vs State of Punjab reported in AIR 1963 SC 531 the order by which the services of the employee were terminated was an order simpliciter in nature, which was innocuously worded, but it was held by this Court that the form of the order was not decisive and the Court could go behind that order to find out whether it was founded upon the misconduct of the employee.

15. In another significant decision in State of Punjab Vs Sukh Raj Bahadur reported in AIR 1968 SC 1089 where the

respondent, who was officiating in the Punjab Civil Service (Executive Branch) was reverted to his substantive post in the Delhi Administration after issuing him a charge-sheet to which a reply was submitted by the respondent but the disciplinary inquiry was not proceeded with, and an order of reversion was passed by way of. The Court laid down the following propositions:

'1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an inquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311, i.e., an enquiry officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.'

16. These principles as also the principle laid down in Champaklal case were reiterated by this Court in Union of India Vs R.S. Dhaba reported in (1969) 3 SCC 603, State of Bihar Vs Shiva Bhikshuk Mishra reported in (1970) 2 SCC 871, R.S. Sial Vs State of U.P. reported in (1975) 3 SCC 111 and it

was laid down that in order to attract the provisions of Article 311(2) it has to be seen whether the misconduct or negligence

was a mere motive for the order of reversion or termination or whether it was the very foundation of that order. It was again reiterated that the form of the order was not conclusive of its true nature and the court has to examine the entirety of circumstances preceding or attendant on the order of termination. To the same effect is the decision of this Court in State of U.P. Vs Sughar Singh reported in 91974) 1 SCC 218 which related to reversion and in which reliance was placed on two earlier decisions in Madhav Laxman Vaikunthe Vs State of Mysore reported in AIR 1962 SC 8 and State of Bombay Vs F.A. Abraham reported in AIR 1962 SC794. It was, however, laid down that if the order visits the employee with penal consequences, the order would be punitive. It was for this reason that order of reversion in that case was held to be bad.

17. In the same year, came the Seven-Judge Bench decision of this Court in Samsher Singh Vs State of Punjab reported in (1974) 2 SCC 831 in which "motive" and "foundation" theory was reiterated and it was laid down that the question whether an order terminating the services of a temporary employee or a probationer was by way of punishment or not would depend on the fats and circumstances of each case. The form of the order, it was observed, was not conclusive and an innocuously-worded order, terminating the services of a temporary employee or a probationer may, in the facts of the case, be found to have been passed on account of serious and grave misconduct in utter violation of Article 311(2) of the Constitution.

18. This decision was followed in State of Punjab Vs Prakash Singh Cheema reported in (1975) 4 SCC 84 and the termination order, regarding which a concurrent finding of fact was recorded by the trial court, the lower appellate court and also

by the High Court in second appeal that it was punitive in nature, was held to be bad.

19. While the judicial pronouncements stood at that stage, the entire case-law was reviewed by this Court in State of U.P. Vs Ram Chandra Trivedi reported in (1976) 4 SCC 52 in which contended that the legal and constitutional position with regard to an order of termination was not settled as there were conflicting decisions of this Court on that question. This contention was not accepted and on are view of the entire case-law, including the Seven-Judge Bench decision in Samsher Singh case it was laid down that the Court has consistently held that the "motive", in passing an order of termination or reversion, operating in the minds of the Government was not a relevant factor for determining whether the order was passed by way of punishment. What was determinative of the true nature of the order was not its exterior form but the "foundation" on which it was based. If misconduct or negligence was the foundation of the order of termination, or for that matter, reversion, the order would be punitive in nature. The Court also referred to the decision in Regional Manager Vs Pawan Kumar Dubey reported in (1976) 3 SCC 334 in which it was observed as under:

'7. We think that the principles involved in applying Article 311(2) having been sufficiently explained in Samsher Singh case it should no longer be possible to urge that Sughar Singh case could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, this application of the same law to the different circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule

deductible fro the application of law to the fats and circumstances of a case which constitutes its ratio decidendi

and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.'

20. Termination simpliciter of a temporary government servant on the ground of unsuitability does not attract the provisions of Article 16, nor is the protection under Article 311(2) of the Constitution available to a temporary government servant unless the termination involved "stigma", was the dictum laid down by this Court in Commodore Commanding, Southern Naval Area Vs V.N. Rajan reported in (1981) 2 SCC 636.

21. In Gujarat Steel Tubes Ltd. Vs Gujarat Steel Tubes Mazdoor Sabha reported in (1980) 2 SCC 593 it was laid down that a court or tribunal is entitled to find out the true nature of the termination order, namely, whether it is punitive or not. In this regard, the form of the order will not be decisive and the court can lift the veil to see the true nature of the order. The court observed that the substance, not semblance, governs the decision. The Court further observed that what was decisive was the plain reason for the discharge and not the strategy of a non-inquiry. If the basis was not the misconduct, the order could be saved. The Court further observed that the mere fact that after being satisfied of the guilt the Government abandons the inquiry and proceeds to terminate the services by a simple order, would not be the relevant factor in considering the true nature of the order. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion would be "dismissal" even if full benefits, as on simple termination, are given and non-injurious terminology is used.

22. The tests for determining whether termination was a termination simpliciter or by way of punishment laid down in

earlier decision were reiterated in Oil & Natural Gas Commission Vs (Dr.) Mohd. S. Iskender Ali reported in (1980)

3 SCC 428 and Nepal Singh Vs State of U.P. reported in (1980) 3 SCC 288. The latter was a case of termination simpliciter on account of the drive launched by the Inspector General of Police for weeding out police officers who were unsuitable or unfit to be continued in service. On the facts and circumstances of that case, it was held that the question whether the appellant, who was a temporary servant, should be retained in service, directly arose during the drive launched to weed out unsuitable officers and it was for this reason that the termination order was upheld, particularly as there was nothing to show that the termination order was made by way of punishment. In another decision which, incidentally, again in Nepal Singh Vs State of U.P. reported in (1985) 1 SCC 56, the Court held that where the services of a temporary government servant are terminated on the ground that his reputation for corruption makes him unsuitable for retention in the service, the State, or for that matter, any statutory employer, must take great care when proceeding to terminate a career on the ground of unsuitability, to ensure that its order is founded on definable material, objectively assessed and relevant to the ground on which the termination is effected. It was observed that the Court will view with great disfavour any attempt to circumvent the requirement of Article 311(2). In Anoop Jaiswal Vs Govt. of India reported in (1984) 2 SCC 369 it was found on a consideration of the entire record that the real foundation for the order of discharge of the appellant probationer was the alleged act of misconduct. This, it was observed, made the impugned order punitive in nature and was, therefore, held to be bad.

23. Shesh Narain Awasthy Vs State of U.P. reported in (1988) 2 LLJ 99 (SC) was a case of a temporary Constable in the U.P. Police whose services were terminated by an apparently innocuous order. On scrutiny it was found that the

services were terminated on account of his alleged participation in activities of an unrecognised Police

Karamchari Parishad. The termination order, therefore, was held to be bad as having been passed without following the procedure prescribed under Article 311(2) of the Constitution.

24. In Ravindra Kumar Misra Vs U.P. State Handloom Corpn. Ltd. reported in 1987 Supp SCC 739, it was held that for finding out the effect of the order of termination, the concept of "motive" and "foundation" has to be kept in mind. It was further observed that no straitjacket test can be laid down to distinguish to two, namely, the "motive" and the "foundation". Whether motive has become the foundation has to be decided by the court with reference to the facts of a given case. It was also observed that "motive" and "foundation" are certainly two points of one line – ordinarily apart but when they come together, "motive" gets transformed and merged into "foundation". It was also observed that since in regard to a temporary employee or an officiating employee an assessment of the service is necessary, merely because the authority proceeds to make an assessment and records it views, it would not be available to be utilized to make the order of termination, following such assessment, punitive in character. It was observed by this Court that in the relationship of master and servant there is a moral obligation to act fairly. There should be an assessment of the work of the employee and if any defect is noted in his working, the employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiency, indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put he employee on the right track. Without any such communication , it was observe, it would be arbitrary to give a movement order to the employee on the ground of unsuitability.

25. In State of U.P. Vs Kaushal Kishore Shukla which has been relied upon by the High Court in the impugned judgment, it was held that merely because preliminary inquiry was held against a temporary government servant, would not be a ground to held that an order, otherwise innocuous on the face of it, by which the services were terminated, was punitive in nature. The decision in Nepal Singh Vs State of U.P. was held to be per incuriam as in that case. Champaklal case was not considered, but the Court did observe that if on an overall assessment of the work and conduct of the employee the authority competent in that behalf to terminate the service, is satisfied that on account of the employee's general unsuitability and inefficiency or misconduct it would not be in the public interest to retain him in service, it may either terminate the services by an innocuous order or may proceed to take punitive action by holding a regular departmental enquiry. The Court, however, emphasized that the termination has to be in accordance with the terms and conditions of service regulated by the relevant rules.

26. In Radhey Shyam Gupta Vs U.P. State Agro Industries Corpn. Ltd. reported in (1999) 2 SCC 21 which related to a probationer, the whole legal position was reviewed by brother M. Jagannadha Rao, J. in an illuminating and research-oriented judgment and after considering various decisions including the decision in Kaushal Kishore Shukla case and a still later decision in Commr., Food & Civil Supplies, Lucknow, U.P. Vs Prakash Chandra Saxena reported in (1994) 5 SCC 177 so as to trace the development of law relating to this aspect of service jurisprudence, laid down that there has not been any conflict of opinion inter se various judgments including those laying down the "motive" and "foundation" theory. It was held that the question whether the order by which the services were terminated was innocuous or punitive in nature had to be decided on the facts of each case after considering the relevant

facts in the light of the surrounding circumstances. The benefit and protection of Article 311(2) of the Constitution is available not only to temporary servants but also to a probationer and

the court in an appropriate case would be justified in lifting the veil to find out the true nature of the order by which the services were terminated.

27. The whole case law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left, the order punitive. It was urged before this Court, more than once including in Ram Chandra Trivedi case that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the principles already laid down by this Court in various decisions to be applied to a different situation. But the concept of "motive" and "foundation" was always kept in view.

28. The important principles, which are deductible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of

misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.

30. Applying these principles to the facts of the present case, it will be noticed that the appellant, who was recruited as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, U.P., had successfully completed his training and had also completed two years of probationary period without any blemish. Even after the completion of the period of probation under para 541 of the UP Police Regulations, he continued in service in that capacity. The incident in question, namely, the quarrel was between two other Constables in which the appellant, to begin with, was not involved. When the quarrel was joined by few more Constables on either side, then an inquiry was held to find out the involvement of the Constables is that quarrel in which filthy language was also used. It was through this inquiry that the appellant's involvement was found established. The termination was founded on the report of the preliminary inquiry as the employer had not held the preliminary inquiry to find out whether the appellant was

suitable for further retention in service or for confirmation as he had already completed the period of probation quite a few years ago but was held to find out his involvement. In this

situation, particularly when it is admitted by the respondent that the performance of the appellant throughout was unblemished, the order was definitely punitive in character as it was founded on the allegations of misconduct.

31. There is another aspect of the matter.

32. Para 541 of the U.P. Police Regulations provides as under:

'541 (1) Recruits will be on probation for a period of two years, except that –

a. *those recruited directly in the Criminal Investigation Department or District Intelligence Staff will be on probation for three years, and*
b. *those transferred to the Mounted Police will be governed by the directions contained in para 84 of the Police Regulations.*

If during the period of probation their conduct and work have been satisfactory and they are approved by the Deputy Inspector General of Police at the end of the period of probation for service in the force the Superintendent of Police will confirm them in their appointment.

(2) In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police office he may dispense with his services. Before, however, this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge.

(3) Every order passed by a Superintendent under sub-para (2) above shall, subject to the control of the Deputy Inspector General, be final.'

33. Where, therefore, the services of a probationer are proposed to be terminated and a particular procedure is prescribed by the Regulations for that purpose, then the termination has to be brought about in that manner. The probationer Constable has to be informed of the grounds on which his services are proposed to be terminated and he is required to explain his position. The reply is to be considered by the superintendent of Police so that if the reply is found to be convincing, he may not be deprived of his services.

34. If this procedure is followed and the services are terminated thereafter, it would not amount to a punitive action. The rule being mandatory in nature, compliance therewith would not alter the nature of the order passed against the probationer. This aspect was considered by this Court in two decisions, namely, State of Orissa Vs Ram Narayan Das and Ranendra Chandra Banerjee Vs Union of India in terms of Rule 55-B of the Civil Services (Classification, Control & Appeal) Rules, which, in all respects, is akin to para 541 of the UP Polcie Regulations quoted above. The relevant portion of Rule 55-B which was extracted in the case of State of Orissa Vs Ram Narayan Das is quoted below:

'Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment.'

35. Immediately after quoting the Rule, the Court observed:

'Notice to show cause whether the employment of the respondent should be terminated was, by Rule 55-B made obligatory.'

36. The Court, after considering that the State had complied with the requirements of Rule 55-B came to the conclusion that

The order of termination of services of the probationer was not punitive in nature.

37. In Ranendra Chandra Banerjee Vs Union of India, the Court while considering the provisions of Rule 5-B, observed as under:

'Therefore in a case covered by Rule 55-B all that is required is that the defects noticed in the work which make a probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice, enabling him to give an explanation as to the faults pointed out to him and show any reason why the proposal to terminate his services because of his unsuitability should not be given effect to. If such an opportunity is given to a probationer and his explanation in reply thereto is given due consideration, there is in out opinion sufficient compliance with Rule 55-B Generally speaking the purpose of a notice under Rule 55-B is to ascertain, after considering the explanation which a probationer may give, whether he should be retained or not and in such a case it would be sufficient compliance with that rule if the grounds on which the probationer is considered unsuitable for retention are communicated to him and any explanation given by him with respect to those grounds is duly considered before an order is passed."

38. In tow other cases, namely, State of Bihar Vs Gopi Kishore Prasad and Samsheer Singh Vs Stat of Punjab the question of termination of services of a probationer was considered and it was laid down that the form of the order was not conclusive and the court could go behind the order to find

out the real foundation of that order. Radhey Shyam Gupta Vs U.P. State Agro Industries Corpn. Ltd. Which has been decided by brother Jagannadha Rao, J. was also a case where the services of a probationer were terminated.

39. As we have already seen above, there has been total non-compliance with the provisions of para 541 of the UP Police Regulations and services of he appellant were terminated without ever issuing him any notice intimating the grounds on which his services were proposed to be terminated nor was his explanation ever obtained. The services were terminated because he was found involved in a quarrel between two other Police Constables.

40. For the reason stated above, the appeal is allowed, the impugned judgment passed by the High Court is set aside and that of the UP Public Services Tribunal is restored, but without any order as to costs."

As well appear form the facts of the present case that the petitioner is a member of the Pradeshik Arrmed Constabulary under Armed Constabulary Act, 1948. He was enrolled as a member of the PAC on 13.9.94 as a Constable form amongst the general candidates and was posted to 46 Bn. PAC Task Force Rudrapur, Udham Singh Nagar.

Aforesaid facts have not been disputed by the respondents.

Counsel for the petitioner has referred Rule 14(1) regarding departmental proceedings. It reads as under:

"Upon institution of a formal enquiry such police officer against whom the enquiry has been instituted shall be informed to writing of the grounds on which it is proposed to take action and shall be afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be used in the from of a definite charge or charges as in Form 1 appended to these Rules which shall be communicated to the charged police officer and which shall so clear and

precise as to give sufficient indication to the charged police officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state whether he desires to be head in person. If he so desires, or if the Inquiry Officer so

directs an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be recorded as the Inquiry Officer considers necessary. The charge police officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish; provided that the Inquiry Officer may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the ground thereof. The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged police officer."

In view of the aforesaid facts, admittedly no opportunity was given to the petitioner, before the impugned order was passed and as such, the termination order is wholly illegal for want of proper opportunity to the petitioner.

The Apex Court has rightly pointed out in paragraph 28 of its judgment in the case of Chandra Prakash Shahi Vs State of U.P. (supra) with regard to the principles, which are deductible on the concept of motive and foundation. The Apex Court has observed as under:

"28. The important principles, which are deductible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his

further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order

terminating the service is passed on the basis of that injury, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

Further, the Apex Court in paragraph 34 of the judgment in the case of Chandra Prakash Shahi Vs State of U.P. & others (supra) has held that if the procedure is followed and the services are terminated thereafter, it would not amount to punitive action. The Apex Court has also relied upon paragraph 541 of the U.P. Police Regulations as well as Rule 55(B) extracted from the case of State of Orissa Vs Ram Narayan (supra). Rule 55(B) of the Civil Service (Classification, Control & Appeal) Rules reads as under:

'Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment.'

So far as the judgment in the case of State of U.P. Vs Kaushal Kishore Shukla (supra) is concerned, there was a preliminary inquiry held against the Government servant and in these circumstances, the Apex Court in paragraph 25 has referred about the preliminary inquiry in the following points:

"25. In State of U.P. Vs Kaushal Kishore Shukla which has been relied upon by the High Court in the impugned judgment, it was held that merely because preliminary inquiry was held against a temporary government servant, would not be a ground to hold that an order, otherwise innocuous on the face of it, by which the services were terminated, was punitive in nature."

The Apex Court in the case D.K. Yadav vs. J.M.A. Industries Ltd; (1993) 3 SCC 259 has held as under:

It is a fundamental rule of law that no decision just be taken which will affect the right of any person without fist being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill vs. Chief Election Commissioner (1978) 1 ACC 405 the Constitution Bench held that civil consequences covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehension connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edn. Page 1487 defined civil rights are such as belong to every citizen of the state of country…. they include…… rights capable of being enforced or redressed in a civil action….. In State of Orissa vs. (Miss) Binapani Dei (1967) 2 SCR 625 this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence is support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principle of natural justice.

In State of W.B. vs. Anwar Ali Sarkar 1952 SCR 284: AIR 1952 SC 75 per majority, a seven Judges Bench held that the

rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In Maneka Gandhi vs. Union of India (1978) 1 SCC 248 another Bench of seven Judges held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from

the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statue or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority. Which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must taken care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way, which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice."

In the case of Dipti Prakash Banerjee Vs Satvendra Nath Bose National Centre for Basis Sciences, Calcutta & others reported in AIR 1999 SC 983, it has been held as under:

"20. As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in Madan Gopal Vs State of Punjab, AIR 1963 SC 531, there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very

question was gone into recently in R.S. Gupta Vs U.P. State Agro Industries Corporation Ltd., (1998) 8 JT (SC) 585: (1999 AIR SCW 207) and reference was made to the development of the law from time to time starting from Parshottam Lal Dhingra Vs Union of India, 1958 SCR 828 : (AIR 1958 SC 36), to the concept of 'purpose of inquiry' introduced by Shah, J. (as he

then was) in State of Orissa Vs Ram Narayan Das, (1961) 1 SCR 606 : (AIR 1961 SC 177) and to the seven Bench decision in Samsher Singh Vs State of Punjab, (1974) 2 SCC 831 (AIR 1974 SC 2192) and to post Samsher Singh case-law. This Court had occasion to make a detailed examination of what is the 'motive' and what is the 'foundation' on which innocuous order is based.

21. This Court in that connection referred to the principles laid down by Krishna Iyer, J. in Gujarat Steel Tube Vs Gujarat Steel Tubes Mazdoor Sangh, (1980) 2 SCC 593 : (AIR 1980 SC 1896). As a 'foundation', it was said by Krishna Iyer, J. as follows (Paras 53 and 54 of AIR):

> *'……..a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from it nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given an non-injurious terminology is used.'*

and as to motive:

'On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary

cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.'

As to motive one other example is the case of State of Punjab Vs Sukh Raj Bahadur (1968)3 SCR 234: (AIR 1968 SC 1089), where a charge memo for a regular inquiry was served, reply given and at that stage itself the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination order was issued. It was findings as to misconduct. In that case, this Court referred to A.G. Benjamin Vs Union of India (Civil Appeal No. 1341 of 1966 dt. 13.12.1966) (SC) (reported in 1967 (15) Fac LR 347) where a charge memo was issued, explanation was received, an inquiry officer was also appointed but before the inquiry could be completed, the proceedings were dropped and a simple order of termination was passed, the reason for dropping the proceedings was that "departmental proceedings will take a much longer time and we are not sure whether after going through al the foundation, we will be able to deal with the accused in the way he deserves'. The termination was upheld.

22. If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no findings were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against

whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position of the employer did not want to inquiry into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegation would be a

motive and not the foundation and the simple order of termination would be valid.

23. In the light of the above principles, laid down in R.S. Gupta's case (1999 AIR SCW 207) we do not think anything more is to be added."

The above judgment has been referred in the case of V.P. Ahuja Vs State of Punjab & others reported in AIR 2000 Supreme Court 1080, the Apex Court has observed as under:

"The observation of the High Court that 'The impugned order is not stigmatic and nothing at al has been urged that may detract from such an order being passed during the currency of probation' is surprising, to say the least. The order by which the services of the appellant were terminated has already been quoted by us above. The order, ex facie, is stigmatic as also punitive. The order is founded on the ground that the appellant had failed in the performance of his duties administratively and technically. It is for this reason that the services of the appellant were terminated. As pointed out above, the order ex facie, is stigmatic.

A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice.

The affidavits filed by the parties before the High Court as also in this Court indicate the background in which the order, terminating the services of the appellant, came to be

passed. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the appellant.

The entire case law with respect to a "probationer" was reviewed by this Court in a recent decision in Dipti Prakash Banerjee Vs Satvendra Nath Bose National Center for Basis Sciences, Calcutta, (1993) 3 SCC 60: AIR 1999 SC 983: (1999) 1 JT (SC) 396: (1999 AIR SCW 605 : 1999 Lab IC 1114). This decision fully covers the instant case as well, particularly as in this case, the order impugned is stigmatic on the face of it."

In the case of Smt. Maneka Gandhi Vs. Union of India and another, AIR 1978 SC 597, the Apex Court has observed as under:-

" It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action."

" In England, the rule was thus expressed by Byles, J. In Cooper Vs. wandsworth Board of Works: (1863) 14 CB (NS) 180:

" The laws of God and man both give the party an opportunity to make his defence, it he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded the that thou shouldest not eat." And the same question was put to Eve also."

The judgment in the case of Menaka Gandhi (supra) has been followed in the case of West Bengal Electricity Regulatory Commission Vs. C.E.S.C Ltd. JT 2002(7) SC 578, relying upon the case of Mrs. Maneka Gandhi VS. Union of India and another, 1978(1) SCC 248 as under:-

"The right of audi alteram partem is a valuable right recognized even under the India Constitution . See Mrs. Menaka Gandhi Vs. Union of India and another, 1978(1) SCC 248 wherein it is held , the principle of the maxim which mandates that no one should be condemned unheard; is a part of rule of natural justice. We have already held that such right

Of hearing conferred by a statute cannot be taken away even by courts."

It has been held by a Division Bench of Allahabad High Court consisting of Hon'ble Mr. Justice M. Katju and Hon'ble Mr. Justice U.K. Dhaon that a temporary employee is also entitled for all benefits it has been observed as under:

"The traditional concept has been that a temporary employee has not right to the post vide State of U.P. Vs Kaushal Kishore reported n 1991 (62) FLR 350 (SC) and Triveni Shankar Saxena Vs State etc. reported in 1992 (64) FLR 330 (SC). However, in our opinion, this traditional concept has now to stand modified in the light of the new interpretation of Article 14 to the Constitution given by the Supreme Court in the Seven Judge Constitution Bench decision in Meneka Gandhi Vs Union of India AIR 1978 SC 597. It has been held in that decision that Article 14 is not only directed against discrimination but also against arbitrariness. Hence, in our opinion, the traditional concept that a temporary employee has no right to the post has now stands modified in view of the new interpretation of Article 14 in Menaka Gandhi's case and it can no longer be treated as an absolute concept."

In this case, admittedly, no opportunity was given to the petitioner, before the impugned order was passed and as such, the termination order is wholly illegal for want of proper opportunity to the petitioner. I find that the termination order dated 19.06.98 is punitive in nature and has been passed without preliminary inquiry. The termination order, therefore, is liable to be quashed.

In view of the aforesaid facts and circumstances, the writ petition is allowed. The order of termination dated 19.06.1998 and the appellant order 9.1.2000 are, hereby, quashed. There will be no order as to costs.

(Rajesh Tandon, J.)

Date: 12.03.2004

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